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Baltimore City's Liability for Riot Damage: the Mayor as Conservator of the Peace - Mayor & City Council of Baltimore v. Silver

BALTIMORE CITY'S LIABILITY FOR RIOT DAMAGE: The Mayor As Conservator Of The Peace

Mayor & City Council of Baltimore v. Silver[1]

The Maryland Court of Appeals in *Mayor & City Council of Baltimore v. Silver* recently rejected a vigorous attack upon the Maryland Riots Act[2] as that statute applies to Baltimore City. In so doing it noted that the City may be liable for riot damages under the Act[3] even though under the Police Omnibus Act[4] it has no direct control over its police department.[5]

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1. 263 Md. 439, 283 A.2d 788 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

2. MD. ANN. CODE art. 82 (1969). The Act imposes liability in certain situations upon local political units for damages caused by riots. See note 9 *infra*.

3. *Id.* § 3. Maryland is one of four states which impose local liability for riot damages based upon the negligence of local officials. The other states are Connecticut [CONN. GEN. STAT. ANN. § 7-108 (1959)], Kansas [KAN. STAT. ANN. § 12-203 (Supp. 1967)] and Kentucky [KY. REV. STAT. ANN. § 411.100 (1972)]. *See generally* Comment, *The Aftermath of the Riot*, 116 U. PA. L. REV. 649, 687 (1968).

4. Police Omnibus Act, ch. 203, [1966] Md. Laws 422.

5. Baltimore is the only city in the United States subject to both state control of its police and local fault liability for riot damage. Four other states exercise control over the local police force of one or more cities or towns: Maine (Lewiston); Massachusetts (Boston and Fall River); Missouri (St. Louis, Kansas City and St. Joseph); and New Hampshire (Berlin, Dover, Exeter, Laconia, Manchester and Nashua). B. SMITH, POLICE SYSTEMS IN THE UNITED STATES 187 (2d rev. ed. 1960). These states all impose some form of strict liability for riot damage upon the political subdivisions. *See* ME. REV. STAT. ANN. tit. 17, § 3354 (1964); MASS. ANN. LAWS ch. 269, § 8 (1968); MO. ANN. STAT. §§ 537.140-.160 (1953); N.H. REV. STAT. ANN. §§ 31:53-:55 (1970). *See also* Comment, *The Aftermath of the Riot*, 116 U. PA. L. REV. 649, 687 n. 189 (1968).

The case arose out of several days of rioting following the assassination of Martin Luther King in April of 1968. After the filing of approximately 400 suits, based on the Riots Act, for damages to personal and real property, with another 1500 such suits anticipated, the City filed a petition for declaratory relief against two of the original plaintiffs. The City alleged that the conjunctive operation of the Riots Act and the Police Omnibus Act would deprive it of both due process and equal protection since its liability would be based on the negligence of public officials over which the City had no control. The defendants answered that the City had at its disposal other methods of control over the disorder apart from the police force and that therefore the declaratory relief should be denied. The Maryland Court of Appeals affirmed the lower court's dismissal of the petition and remanded the case for a declaration of the rights of the parties.[6]

After an analysis of both statutes, the court concluded that the Mayor and the City Council did have some power of control other than the police force and that this largely consisted of the Mayor's power as conservator of the peace to call out the *posse comitatus*.[7] In response to the City's contention that this power was an anachronism in present-day society, the court held that the question of what use of the *posse* might have been made was one for the trier of fact. Since the City's action was for declaratory relief only, the court refused to hold as a matter of law that the use of this power would be unrealistic.

This note will examine these two Acts and the Mayor's residual powers, with an emphasis upon the conservator of the peace and the *posse comitatus*.[8] A discussion of the origin, development

6. Judge Harris did not make a declaration of the rights of the parties in his final order because he had made such a declaration in an opinion filed August 12, 1970 before reargument of the case. The court remanded for Judge Harris to amend his final order to include such a declaration. *Cf.* Hunt v. Montgomery County, 248 Md. 403, 237 A.2d 35 (1968). For the declaration see Restatement of Order of December 21, 1970, Mayor & City Council of Baltimore v. Silver, No. 120649 (Super. Ct., Baltimore, Dec. 20, 1971).

7. The *posse comitatus*, or power of the county, consists of all males over the age of fifteen, with some exceptions, formed into a citizen's group to aid the sheriff and other officials in enforcing the law. *See* notes 83-85 *infra* and accompanying text.

The court also mentioned other courses of action which might have been open to the Mayor such as communication and cooperation with, and suggestions to, the Police Department. With respect to these alternatives also, the court left the question of what actions the City could or should have taken for the jury.

8. This note will not discuss other problems relating to municipal liability for riot damages which have been fully explored by several good general articles covering this subject. *See, e.g.*, Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U.L.J. 351 (1957); Sengstock, *Mob Action: Who Shall Pay the Price?*, 44 J. URBAN L. 407

and application of these statutes and these common law concepts will expose a basic contradiction in the application thereof and will show that the policies behind these elements of the City's liability for riot damage are for the most part incompatible with modern urban society. The *Silver* decision has drawn the lines of the controversy, but the legislature, or possibly the courts in another case, will have to reevaluate the underlying policies and resolve the conflicts inherent in this anomalous situation.

THE RIOTS ACT

The Riots Act[9] presently in force allows any person who suffers property damage from a riotous mob to recover the amount of that damage from the local political subdivision in which the property is located, provided that: first, the local authorities had notice or reason to know that a riot was taking place or about to take place; second, the authorities had the ability to prevent the damage, either by themselves or with the aid of citizens; and third, the civil authorities and the citizens failed to use reasona-

(1967); Note, *Riot Victim Compensation*, 68 COLUM. L. REV. 57 (1968); Comment, *The Aftermath of the Riot*, 116 U. PA. L. REV. 649 (1968).

9. MD. ANN. CODE art. 82, §§ 1-3 (1969) state:

§ 1. Liability of county, city or town to owner for destruction of property.

If in any county or incorporated town or city of this State, any church, chapel or convent, any dwelling house, any house used or designed by any person or any body corporate as a place for the transaction of business or deposit of property, any ship, shipyard or lumberyard, any barn, stable or other outhouse, or any articles of personal property shall be injured or destroyed, or if any property therein shall be taken away, injured or destroyed by any riotous or tumultuous assemblage of people, the full amount of the damage so done shall be recoverable by the sufferer or sufferers by suit at law against that county, town or city within whose jurisdiction such riot or tumult occurred.

§ 2. Condition of liability.

No such liability shall be incurred by any county, incorporated town or city, unless the authorities thereof shall have had good reason to believe that such riot or tumultuous assemblage was about to take place, or having taken place, shall have had notice of the same in time to prevent said injury or destruction, either by its own police or with the aid of the citizens of such county, town or city, it being the intention of this article that no such liability shall devolve on such county, town or city, unless the authorities having notice have also the ability of themselves, or with their own citizens, to prevent said injury; and all causes of action under § 1 shall be prosecuted within the period of three years from the time of accrual of the same.

§ 3. No liability where proper care exercised.

In no case shall indemnity be recovered when it shall be satisfactorily proved that the civil authorities and citizens of said county, town or city, when called on by the civil authorities thereof, have used all reasonable diligence and all the powers intrusted to them for the prevention or suppression of such riotous or unlawful assemblages.

ble diligence and all of their powers to prevent or suppress the riot. The court in *Silver* found that the local authorities—the Mayor and the City Council of Baltimore City—might have had the ability to prevent the riots or at least to minimize the damage, and that the issue of whether these authorities failed to use reasonable care in exercising their powers would be one for the trier of fact.[10]

An understanding of the development of and the basic purposes of the Riots Act is necessary to place the present Act in its proper perspective. Several American cases have traced the origin of riots acts in general to early English acts which imposed local liability for damages resulting from various criminal activities.[11] For example, under a law of Canute the Dane, the ville or the hundred[12] had to pay damages for the death of any person if the killer escaped.[13] In 1285, the Statute of Winchester placed liability upon the hundred for damages from robberies and other offenses.[14] Following an accumulation of other enactments,[15] the English Riots Act of 1714[16] provided, among other things, that persons whose buildings were destroyed by a rioting mob could recover damages from the hundred, city or town where the damage occurred. Finally, the Riots Damages Act of 1886[17] modernized the procedures for recovering riot damages from the police district in which the damaged buildings were located.

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10. 263 Md. at 456, 283 A.2d at 797.

11. *See, e.g.*, City of Chicago v. Sturges, 222 U.S. 313, 323 (1911); County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 405 (1879). *See also* note 13 *infra*.

12. The hundred was a subdivision of the county or shire, composed of ten tithings (groups of ten families of freeholders). A ville was a smaller unit within the hundred, similar to a town. BLACK'S LAW DICTIONARY 874 (4th ed. 1951); 1 W. BLACKSTONE, COMMENTARIES *115. For a short article discussing the existence of the hundred in Washington County, Maryland, as late as 1800 see Wyand, *The Hundreds of Washington County*, 67 MD. HIST. MAGAZINE 302 (1972).

13. Darlington v. Mayor of New York, 13 N.Y. 164, 187 (1865); 1 J. REEVES, HISTORY OF THE ENGLISH LAW 196 (Finlason ed. 1880); *cf.* A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 21-22 (1966).

14. 13 Edw. I, stat. 2, c. 2 (1285) provided:

> And if the Country will not answer for the Bodies of such manner of Offenders, the Pain shall be such, that every Country, that is to wit, the People dwelling in the Country, shall be answerable for the Robberies done, and also the Damages; so that the whole Hundred where the Robbery shall be done, with the Franchises being within the Precinct of the same Hundred, shall be answerable for the Robberies done.

15. As a result of the Parliament's piecemeal approach there were many acts, each of which dealt with a particular problem. A few of these are discussed below. *See, e.g.*, notes 74 and 86 *infra*.

16. 1 Geo. I, stat. 2, c. 5, § 6 (1714).

17. 49 & 50 Vict. c. 38 (1886).

That part of the Statute of Winchester discussed above and the Riots Act of 1714 apparently have not been incorporated into Maryland common law.[18] The first Maryland statute imposing local liability for riot damage was the Riots Act of 1835,[19] which was probably a legislative reaction to the bank riots of 1835.[20] The same legislature[21] established a commission to assess the damages and to reimburse the property owners out of $20,000 appropriated in 1827 for the improvement of the Baltimore City harbor,[22] with a provision that the City could redeem the $20,000 by assessment or loan. In 1867, the legislature added a limitation of actions clause to the Riots Act,[23] and, except for this change and some minor changes in wording, the present Riots Act is a verbatim reenactment of the 1835 Act.[24]

There are several basic reasons for imposing riot damage liability upon local governmental units.[25] Although the most obvious reason is to reimburse the victims of property damage or personal injury, Mr. Justice Lurton, speaking for the United States Supreme Court in *Chicago v. Sturges*,[26] expressed what is perhaps the true motivation behind riots acts:

Such a regulation has a tendency to deter the lawless, since

18. Part of the Statute of Winchester dealing with Hue and Cry and with the night-watch, 13 Edw. I, stat. 2, c. 1 and 4 (1285), are found in J. ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND 151, 152 (1870), but the remainder of the Statute and the Riots Act of 1714 are not included. Moreover, no Maryland Court of Appeals decision has ruled that these statutes have been incorporated. ALEXANDER consists of the statutes which Chancellor Kilty found to be appropriate for incorporation into the Maryland common law, plus a few statutes actually incorporated by the court. Although no court or legislature has officially adopted ALEXANDER or Kilty's Report to the legislature in 1810 the latter was called "a safe guide in exploring an otherwise very dubious path" in Dashiell v. Attorney General, 5 Har. & John. 392, 403 (Md. 1822). Presumably ALEXANDER is also a safe guide. *See generally* MD. CONST., DECL. OF RIGHTS art. 5.

19. Ch. 137, [1835] Md. Laws.

20. Judge Finan quoted from the description of the riots in J.H. Brewer's essay "Democratization of Maryland, 1800-1837" in THE OLD LINE STATE 63 (Radoff ed. 1971). 263 Md. at 454-55, 283 A.2d at 796.

21. Ch. 184, [1835] Md. Laws.

22. Ch. 111 § 21, [1827] Md. Laws.

23. Ch. 282, § 2, [1867] Md. Laws 549.

24. *Compare* the Riots Act of 1835 [ch. 137, [1835] Md. Laws] *with* the present Act [see Note 9 *supra*].

25. *See, e.g.*, Sengstock, *Mob Action: Who Shall Pay the Price?*, 44 J. URBAN L. 407, 425 (1967); Legislation Note, *Liability of the Municipality for Mob Violence*, 6 FORDHAM L. REV. 270, 272-73 (1937).

26. 222 U.S. 313 (1911). There the Supreme Court upheld the validityof an Illinois statute imposing absolute liability upon cities or counties for three-fourths of the damages from a riot of thirteen or more people. This is the most recent Supreme Court case regarding the validity of riots acts in general, and apparently is still good law.

> the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law.[27]

Justice Lurton also pointed out that local authorities would use greater care and energy in suppressing riots if the local governmental unit was faced with the threat of liability for damages.[28]

The force of this logic derives from the historical setting behind these acts; the most significant fact, which is ignored by those cases giving some of the history behind the riots acts,[29] is that most of the riots acts placing liability upon the local government were enacted at a time when the concept of a police force as it is thought of today did not exist. The acts were one of the methods by which the sovereign—the King or Queen of England, or the state government—could maintain law and order in the country or state. For example, the preamble to, and the first chapter of, the Statute of Winchester[30] clearly shows that the purpose of that statute was to compel the local authorities and the citizens of the hundred to police themselves. The situation was much the same over four hundred years later when Parliament passed the Riots Act of 1714,[31] for the Act not only provided for damage relief to the victims but also provided the death penalty for any person participating in a riot of twelve or more people who failed to disperse within an hour of being commanded to do so by any of the local authorities and for any person who opposed or interfered with the local authorities' delivery of such proclama-

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27. *Id.* at 323-324.

28. 222 U.S. at 323.

29. *See* notes 11 and 13 *supra*. Of course, there are other relevant factors, such as the rural setting or the smaller population of the local community.

30. 13 Edw. I, stat. 2, c. 1 (1285) provided:

> Forasmuch as from Day to Day, Robberies, Murthers, Burnings, and Theft, be more often used than they have been heretofore, and Felons cannot be attainted by the Oath of Jurors, which had rather Suffer Strangers to be robbed, and so pass without Pain, than to indite the Offenders, of whom great Part be People of the same Country, or at the least, if the Offenders be of another Country, the Receivers be of Places near; (2) and they do the same, because an Oath is not given unto Jurors of the same Country where such Felonies were done, and to the Restitution of Damages hitherto no Pain hath been limited for their Concealment and Laches: (3) Our Lord the King, for to abate the Power of Felons, hath established a Pain. . . .

31. I Geo. I, stat. 2, c. 5 (1714).

tion to disperse. The subject matter of this statute was but one small response to an overwhelming crime problem which eventually led to the development of a modern police force in England by the late eighteenth and early nineteenth centuries. Prior to this development, the common law authorities, such as the sheriffs, conservators of the peace, mayors, justices of the peace or bailiffs, had no effective organization for the preservation of the peace.[32] These statutes were attempts to fill that void.

The situation was much the same in Baltimore in 1835, when the Riots Act was adopted, for at a date as late as 1848 the "police" of Baltimore City consisted of "the High Constable, one regular and two special policemen for each ward, and the night watchmen, who carried large wooden rattles . . . [which, when] rotated, made an unearthly clatter, summoning help and at the same time deadening the footfalls of escaping miscreants."[33] Citizens frequently had to rely upon other citizens for protection of property and personal interests, especially in the case of riots.[34] The very wording of the Riots Act suggested this reliance, since liability depended upon: the authorities having had enough time after notice to prevent damage "either by their own police, or with the aid of the citizens . . . ;" the authorities having had the "ability of themselves, or with their citizens" to prevent injury and the use of reasonable diligence by "the civil authorities and citizens . . . when called on by the civil authorities. . . ."[35]

An early case applying the Riots Act, *Hagerstown v. Dechert*,[36] illustrated this reliance upon citizen action because there the city had no police force. The court held that the Mayor was a conservator of the peace and that he had the duty and the power to summon the citizens of the town, that is, the *posse comitatus*, to suppress the riot which destroyed the plaintiff's printing press and property. The plaintiff argued that the statutory language "with their citizens," when combined with the Mayor's common law obligations, specifically imposed this duty

32. *See generally* C. K. ALLEN, THE QUEEN'S PEACE 69 *et. seq.* (1953); D. BROWNE, THE RISE OF SCOTLAND YARD (1956).

33. Lewis, *The Baltimore Police Case of 1860*, 26 MD. L. REV. 215, 218 (1966). For the early history of police systems in the United States see R. FOSDICK, AMERICAN POLICE SYSTEMS 58-67 (1920); B. SMITH, POLICE SYSTEMS IN THE UNITED STATES 104-06 (2d rev. ed. 1960).

34. *Cf.* Brewer, *supra* note 20, at 63.

35. Ch. 137, [1835] Md. Laws. *See also* MD. ANN. CODE art. 82, §§ 2-3 (1969) for the comparable language, reproduced in Note 9 *supra*.

36. 32 Md. 369 (1870).

upon him,[37] and the court seemed to agree with this interpretation of the statute,[38] the only issue being the Mayor's status as a conservator of the peace.

The court in *Silver* relied heavily upon *Dechert* and at one point implied an analogy between Hagerstown's lack of a police force and Baltimore's lack of control over its police force.[39] However, there is a very real distinction between the two cases which calls into question the basic policies behind the Maryland Riots Act. It may have made sense to impose liability on the local government in 1862 to encourage the local authorities and citizens to do all in their power to suppress riots; however, that rationale no longer applies in a society which has a special organization, trained to control crime, to preserve the peace and to suppress riots.[40] Most citizens today probably believe that the police and the authorities are primarily responsible for preserving the peace and that their duty as citizens goes no further than supplying information to the police or refraining from breaching the peace.[41] This in itself is a material distinction from *Dechert*. Moreover, the deterrent effect of the statute is questionable in view of the fact that, in recent times, most rioters have probably not owned property.[42] A city's liability would only affect them indirectly, perhaps by a reduction in the availability of services. Finally, the presence of riots acts has had no more demonstrable effect in deterring riots than the absence of such acts has in encouraging riots.[43]

That the Maryland Riots Act has outlived some of the reasons for its enactment is understandable, since the *Silver* case was the first reported action under the Act in almost one hundred years. The first case, *Duffy v. Baltimore*,[44] involving an 1849 dis-

37. *See* Brief for Appellee at 12, Hagerstown v. Dechert, 32 Md. 369 (1870).

38. 32 Md. at 382.

39. 263 Md. at 451-52, 283 A.2d at 794-95.

40. *See* notes 106 and 110 *infra* and accompanying text.

41. Comment, *The Aftermath of the Riot*, 116 U. PA. L. REV. 649, 691 (1968). This inference can perhaps be drawn from the large percentage of the residents of the riot areas who claimed non-involvement in the 1967 riots in Detroit and Newark. *See* UNITED STATES NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 73, 330-32, nn. 111-12 (1968) [hereinafter cited as CIVIL DISORDER REPORT].

42. Again, such an inference can be drawn from the profile of the typical rioter. CIVIL DISORDER REPORT 73, 78, 338 n. 160.

43. Compare the riots of Newark, N.J. (1967) and of Philadelphia, Pa. (1964), with the riots of Los Angeles, Cal. (1965) and Detroit, Mich. (1967). The Riots Acts of New Jersey and Pennsylvania are, respectively, N.J. STAT. ANN. §§ 2A: 44:1-9 (1952) and PA. STAT. ANN. tit. 16, §§ 11821-26 (1956); California and Michigan have no riots acts.

44. 7 F. Cas. 1,169 (No. 4,118) (C.C.D. Md. 1852).

turbance, ended in a verdict for the city. In 1866, the Court of Appeals upheld a jury verdict against the city in *Mayor & City Council of Baltimore v. Poultney*,[45] where the city did not raise its lack of control over the Police Department as a defense. Finally, after *Dechert*, the court in *Hagerstown v. Sehner*[46] upheld the validity of the 1867 amendment to the Riots Act, which allowed a five year limitation upon causes of actions arising prior to enactment of the amendment and which specified a three year limitation for subsequent actions.[47] It is apparent, then, that the dearth of riots and of litigation under the Riots Act both explains the lack of any reevaluation of the policies behind the Riots Act and suggests that such a reevaluation be made. Maryland is probably not alone in this respect,[48] but *Silver* presents additional compelling reasons for such a reexamination by the Maryland General Assembly.

STATE CONTROL OVER THE BALTIMORE CITY POLICE DEPARTMENT

In 1860, the General Assembly took control of the Baltimore City Police Department away from the Mayor and City Council.[49] The main reason for this action was the Police Department's indifference to and complicity in the intimidation of voters by the "Know Nothing" gangs which had resulted in the almost complete disfranchising of Democratic Party voters in the city.[50] Other factors may have been the small size and the newness of the police force, but the most immediate result of the Act was the return to the City of elections free from fraud and intimidation.[51] The Maryland Court of Appeals upheld the Act over the City's vigorous objection in *Mayor & City Council of Baltimore v. State ex rel. Board of Police*.[52]

In general, the Act provided for the appointment by the General Assembly of a board of commissioners who exercised control

45. 25 Md. 107 (1866).

46. 37 Md. 180 (1872). This suit arose out of the same riot as did Hagerstown v. Dechert [32 Md. 369 (1870)] and thus the defendant had to rely upon a different defense, the running of the general three year statute of limitations. *See* 37 Md. at 189-90.

47. *See* note 23 *supra*.

48. *See, e.g.*, Sengstock, *Mob Action: Who Shall Pay the Price?*, 44 J. URBAN L. 407, 425 (1967); Note, *Municipal Liability for Riot Damage*, 16 HASTINGS L.J. 459, 462 (1965).

49. Ch. 7, [1860] Md. Laws.

50. For a complete study of the reasons for the Act see Lewis, *The Baltimore Police Case of 1860*, 26 MD. L. REV. 215 (1966).

51. *Id.* at 227.

52. 15 Md. 376 (1860).

over a police force of no more than 350 men.[53] It also specified that the City government could pass ordinances for preserving the public order and the interests of the City, but that no ordinances, or officers or agents of the City could interfere with the powers of the Board of Police.[54]

Section 13 of the Act provided that the Board could in its discretion assume control over the sheriff of Baltimore City, the *posse comitatus*, the militia and all conservators of the peace, and it enumerated heavy monetary penalties for failure to comply with the Board's orders.[55] Section 16 prescribed penalties for any forcible interference with the provisions of the Act by the Mayor or any agent or officer of the City. Finally, Section 19 defined the City's liability to be the same as if the City controlled the police force.[56] In 1867, the legislature amended the Act, reducing to a misdemeanor the failure of the sheriff, peace officers and citizens to obey the Board, and replacing Section 19 of the 1860 Act with a milder statement of the Mayor's and City Council's liability.[57]

This amendment, however, left open the question of the extent of the City's exposure to liability. These amended sections were codified, almost verbatim, in sections 550 and 563 of the 1949 Codification of the Charter and Public Local Laws of Baltimore City.[58]

In 1966, the General Assembly replaced the original Act as amended through the years with a completely restructured Police

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53. Ch. 7, §§ 3, 6, [1860] Md. Laws.

54. Ch. 7, § 1, [1860] Md. Laws.

55. Ch. 7, § 13, [1860] Md. Laws. The penalties were as follows: sheriff—$5,000.00; "any other peace officer"—$500.00; "any private citizen"—$150.00.

56. Ch. 7, § 19, [1860] Md. Laws provided:

> Nothing in this article contained shall be taken to destroy or diminish the liability or responsibility of the Mayor and City Council of Baltimore, for any failure to discharge the duties or obligations of said corporation or any of them, the board of police hereby created being, and they are hereby constituted to be, authorities of the said corporation, for all such purposes, to the same effect as if created and appointed by or under the said Mayor and City Council; *Provided, however*, that nothing in this section shall be construed to give to the said Mayor and City Council or any officer of said corporation, any control over said board or any officer or policeman appointed thereby.

57. Ch. 367, § 824, [1867] Md. Laws 760, 774 stated:

> Nothing in this Act contained, shall be so construed as to destroy or diminish the liability or responsibility of the Mayor and City Council of Baltimore for any failure to discharge the duties or obligations of said Mayor or City Council or any of them, or give the said Mayor or Council any control over said Board or any officer of police, policeman or detective appointed thereby.

58. BALTIMORE, MD., CHARTER AND PUBLIC LOCAL LAWS, §§ 550, 563 (Flack ed. 1949), as authorized by ch. 110, [1949] Md. Laws 135.

Omnibus Act[59] which explicitly designated the Baltimore City Police Department an agency of the state.[60] The Act also repealed section 550 of the 1949 Charter and Code of Public Local Laws for Baltimore City. In *Silver*, the court rejected the City's argument that this repeal and the absence of any mention of the *posse comitatus* implied an abolition of this common law entity.[61] In fact, there is strong support that the legislature intended to preserve the *posse comitatus*, since the Act granted to all police officers, including the Police Commissioner,[62] all of the common law powers of peace officers,[63] which powers include the power to raise the *posse comitatus*.

This statute, as well as the repealed sections, does raise the question however, as to whether the Police Commissioner's power to raise the *posse comitatus* would preclude the Mayor from exercising this same power. While there is no evidence as to whether the power is exclusive, the question may be significant where, as here, the City's liability is based on the Mayor's power as conservator of the peace.

The Act placed upon the Police Department the duty of preserving the public peace and enforcing state laws and city ordinances not inconsistent with the Act[64] and repealed all other inconsistent laws to the extent of the inconsistency.[65] This raises a question of the extent to which these provisions foreclose the City officials from acting to preserve the peace. Whatever power the City has itself must be considered in light of the duty given by this act to the City police force.

THE MAYOR'S POWERS

The court in *Silver* held that despite the 1966 Police Omnibus Act the Mayor could have taken certain courses of action to control the riot. The court noted that the Police Commissioner would have to appear before the City officials for approval of the

59. Ch. 203, § 1, [1966] Md. Laws 422.
60. *Id.* at 424.
61. 263 Md. at 449-50, 456-57, 283 A.2d at 793-94, 797.
62. Ch. 203, § 1, [1966] Md. Laws 422, 424.
63. Ch. 203, § 1, [1966] Md. Laws 422, 425.
64. Ch. 203, § 1, [1966] Md. Laws 422, 424 states:

The department shall have, within the boundaries of said city, the specific duty and responsibility to preserve the public peace; . . . to enforce the laws of this State, and of the Mayor and City Council of Baltimore not inconsistent with the provisions of this subtitle; . . . to preserve order at public places. . . .

65. Ch. 203, § 3, [1966] Md. Laws 422, 444.

Police Department's budget and that this would facilitate the flow of communication. In addition, the Mayor could always make suggestions to the Commissioner. However, the opportunity for the exchange of ideas would seem to be hampered in an emergency situation such as a riot. The Police Commissioner could also ignore the suggestions of the Mayor with impunity, subject only to the threats of future budgetary restraints or retaliation.[66] This duty might become important if it were found that the Mayor failed to pass vital information on to the Police Department. Even so, if this were the extent of the Mayor's powers, he would then have exercised reasonable diligence if he made timely and reasonable suggestions to the Police Commissioner, thus satisfying the due care requirement of the Riots Act. Of course, if this was all that was required the Act would be of negligible value to riot victims in Baltimore City.

Although the court left open the possibility that the failure of the Mayor to make suggestions and to give information to the Police Commissioner might be the basis for negligence, it placed primary emphasis upon the Mayor's common law duties and powers as a conservator of the peace,[67] which include the power to call out the *posse comitatus*, as a basis for liability. Relying heavily upon *Dechert*, the court examined "these ancient vestiges of authority" and concluded that these powers were sufficiently viable to require a determination on the facts as to whether the City's officials' failure to exercise these powers constituted a want of reasonable diligence.[68] The court also relied to a lesser extent upon the police power of the Mayor and the City Council.[69] This

66. The events in the spring of 1973 illustrate the practical problems which the court's suggestions might encounter. Exemplifying the strained relations between the two officials, Mayor William Donald Schaefer reported that Police Commissioner Donald D. Pomerleau had threatened to cut police services if his budget requests for 1974 were not met. Evening Sun (Baltimore), May 3, 1973, § C, at 28, col. 1. On the other side of the dispute, Councilman Robert J. Fitzpatrick, in apparent agreement with City Council president, Walter S. Orlinsky, said that he would support a cut off of funds for the City Police because of the Commissioner's "arrogance of power." The Sun (Baltimore), May 5, 1973, § B, at 11, col. 7. The dispute, arising out of a number of problems between the Police Department, the States Attorney's office, and the Mayor's office, was resolved to some extent by an informal agreement reached in a meeting between the Mayor, the Commissioner, and Governor Marvin Mandel whereby the Mayor could make recommendations to the Commissioner and could compel the Commissioner to report desired information to the Mayor. The Sun (Baltimore), May 8, 1973, § C, at 26, col. 3.

67. BALTIMORE, MD., CHARTER art. IV, § 4 (1964) provides: "The Mayor, by virtue of his office, shall have all the power of a conservator of the peace."

68. 263 Md. at 453, 383 A.2d at 795.

69. BALTIMORE, MD., CHARTER art. II, § 27 (1964) gives the Mayor and City Council the power:

reliance is questionable in view of the fact that the charter merely states a tautology—that the Mayor and City Council may exercise all of the police power that does not conflict with the powers of the Police Commissioner. Additionally, the court reiterated the fact that the City has no "power with regard to enforcement of the law,"[70] but the court did not explain the distinction between this fact and the proposition that the Mayor should use his common law powers to preserve the peace. These points, however, are minor when contrasted with the unfortunate consequences of the resurrection of the conservator of the peace's power to call out the *posse commitatus*.

The Conservator of the Peace

The conservator of the peace is an ancient official, whose primary duty has always been to keep the peace; to this end he may command others to assist him. There is some dispute as to his other specific duties, but they have included administering oaths, taking sureties to keep the peace and assisting the sheriff.[71] The court in *Dechert* described his primary function:

> 'The general duty of the conservators of the peace, by the common law, is to employ their own and to command the help of others to arrest and pacify all such who, in their presence, and within their jurisdiction and limits, shall go about to break the peace.' 3 Burn's Just. 4.[72]

According to Blackstone,[73] there were two types of conservators of the peace at early common law: those who were conservators by virtue of some other office, such as the King, Lord Chancellor, justices of the Court of King's Bench, sheriffs, coroners, and constables; and those who were conservators in their own right, either by virtue of their land holdings or by election by the local populace. In 1327 Parliament provided for the appointment of this latter type,[74] which disappeared when Parliament later

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To have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise said power within said limits; provided, however, that no ordinance of the city or *act of any municipal officer* shall conflict, impede, obstruct, hinder or interfere with the powers of the Police Commissioner. (emphasis added.)

70. 263 Md. at 449, 283 A.2d at 793, relying upon Adams v. Baltimore Transit Co., 203 Md. 295, 100 A.2d 781 (1953).

71. C.K. ALLEN, THE QUEEN'S PEACE 131-32 (1953).

72. 32 Md. at 384-85.

73. 1 W. BLACKSTONE, COMMENTARIES *349-51.

74. 1 Edw. III. stat. 2, c. 16 (1327): "For the better keeping and Maintenance of the

gave to the conservators the power to try felons and thus transformed them into justices of the peace.[75] The concept of the conservator remained, however, as the justice of the peace commission "empowered him singly to conserve the peace; and thereby gave him all the power of the ancient conservators at common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals."[76]

While the concept of the conservator of the peace died out slowly in England, to the point that "the name of conservator is almost forgot,"[77] this concept has been frozen into the Maryland Constitution, which provides that all judges,[78] justices of the peace, and constables[79] are conservators of the peace. The defeat of the proposed constitution of 1968, which excluded these references to the conservator of the peace,[80] preserved it as a legal entity, but despite this situation in Maryland, and in other states as well, there has been little litigation on the subject. The cases only reiterate the general powers of the conservator in deciding whether a certain individual designated as a conservator could or could not do a certain act.[81] In Maryland the only judicial references are in *Dechert* and *Silver*.

The original duties of the conservators, except for the vague duty of keeping the peace, disappeared as the modern police force developed.[82] The need to abolish the office or strictly define more

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Peace, the King will, That in every County good Men and lawful, which be no Maintainers of Evil, or Barretors in the Country, shall be assigned to keep the peace."

75. 34 Edw. III., stat. 1, c. 1 (1360).

76. 1 W. BLACKSTONE, COMMENTARIES *354.

77. Martin v. State, 190 Miss. 32, 199 So. 98, 100 (1940), quoting Lord Chief Justice Camden, in Entick v. Carrington, 19 St. Trials 1029, 1062, 95 Eng. Rep. 807, 817 (K.B. 1765). The version in the English Reports is slightly different from that quoted in *Martin*.

78. MD. CONST. art. 4, § 6.

79. MD. CONST. art. 4, § 42.

80. *See* CONSTITUTIONAL CONVENTION, 1967-1968, COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION 51, 74 (1968).

81. *See, e.g., Ex parte* Levy, 204 Ark. 657, 163 S.W.2d 529 (1942) (a constitutional provision making a judge of the supreme court a conservator of the peace did not empower the judge to issue search and seizure warrants); Martin v. State, 190 Miss. 32, 199 So. 98 (1940) (a clerk of the court, as a civil officer and conservator of the peace, did not have the power to issue an arrest warrant); Marcuchi v. Norfolk & W. Ry., 81 W. Va. 548, 94 S.E. 979 (1918) (a conductor and special police officer, designated conservators of the peace, had the power to arrest a passenger breaching the peace in their presence). *See also In re* Barker, 56 Vt. 14 (1884); Jones v. State, 65 S.W. 92 (Tex. Crim. App. 1901).

82. The court in Mayor & City Council of Baltimore v. State *ex rel.* Board of Police, 15 Md. 376 (1860), in commenting on the constitutional offices of justices of the peace and constables as affected by the Act transferring control over the police department to the

the scope of the conservator of the peace becomes more apparent in view of the conservator's power to call out the *posse comitatus*.

Posse Comitatus

The *posse comitatus*, or "power or force of the county,"[83] consisted of "all persons except clergymen, persons decrepit, women, and infants under 15"[84] in the county. Blackstone briefly described the essential elements of this institution:

> [F]or this purpose [defending his country against the King's enemies] as well as for keeping the peace and pursuing felons, he [the sheriff] may command all the people of his county to attend him; which is called the posse comitatus, or power of the county: and this summons every person above fifteen years old, and under the degree of a peer, is bound [sic] to attend upon warning under pain of fine and imprisonments.[85]

It was clear that the power to call out the *posse comitatus* extended to justices of the peace and other officials who were conservators of the peace, as the power was inherent in the duty of the conservator to call upon his fellow citizen to aid him. Furthermore, several early English statutes, later incorporated into the common law of Maryland, specifically provided this power. For example, a statute designed to suppress riots provided that:

> . . . if any Riot, Assembly, or Rout of People against the Law, be made in Parties of the Realm, . . . the Justice of the Peace, three, or two of them at the least, and the Sheriff or Under-Sheriff of the County where such Riot, Assembly, or Rout shall be made hereafter, shall come with the Power of the County (if need be) to arrest them, and shall arrest them. . . .[86]

Thus, any discussion of the sheriff's power at common law to call out the *posse comitatus* necessarily applies to the conservator's power.

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state, said: "It is not made the duty, nor is it within the nature of his office, that a justice of the peace, or constable, should perform police duty, other than such as looks to the preservation of the peace." *Id.* at 466.

83. BLACK'S LAW DICTIONARY 1324 (4th ed. 1951).

84. J. ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND 203-05 (note to 17 Rich. II, c. 8 (1393)) (1870) [hereinafter cited as ALEXANDER].

85. 1 W. BLACKSTONE, COMMENTARIES *343.

86. 13 Hen. IV, c. 7 (1411), ALEXANDER 213. Other statutes are 17 Rich. II, c. 8 (1393) and 8 Hen. VI, c. 9 (1429), in ALEXANDER 201 and 225, respectively. *See also* note 84 *supra*.

Several other Maryland statutes authorize the use of the *posse comitatus*, and the Board of Police and later the Police Commissioner had and has the power to command the *posse comitatus*. As late as 1953, the Attorney General of Maryland referred to this power.[87] Moreover, a tax collector may summon the *posse comitatus* for aid in preventing intereference with his duties or with any bidding at tax sales.[88] The allowance per person in the *posse* is fifty cents per day, and the fine for failure to serve is five dollars.[89] These laws indicate that the *posse comitatus* as a legal entity is very much alive.[90] Yet there is little litigation concerning the *posse comitatus* in Maryland or in the United States; what litigation there has been indicates that it is a dead institution and that it is not compatible with modern society, especially in the context of riot situations. The majority of cases deal with the power of the sheriff or other peace officer to command bystanders to aid in serving writs or arresting suspects.[91] A sheriff in Elizabethan England could call upon the *posse comitatus* to enforce a writ of estrepement[92] in an action for waste.[93] In the 1813 New York case of *Coyles v. Hurtin*,[94] a sheriff successfully defended against an action for false imprisonment and for assault and battery by relying upon his power to call the *posse*. There, the sheriff, lacking the forces to arrest five men who

87. 38 OP. MD. ATT'Y GEN. 114 (1953).

88. MD. ANN. CODE art. 81, § 124 (Supp. 1972).

89. *Id. See also* MD. ANN. CODE art. 81, §§ 125, 126 (1969). Section 125 provides that the tax collector may summon the *posse comitatus* if he anticipates trouble, and section 126 fixes the penalty for striking or interfering with the collector, a member of the *posse*, or a bidder at a tax sale.

90. An interesting federal statute proscribes the use of any part of the Army or the Air Force as a *posse comitatus*, punishable by fine of up to $10,000 or by imprisonment of up to two years. 18 U.S.C. § 1385 (1970).

91. Several cases mention the *posse comitatus*, though its uses are not relevant to the issue here. These cases dealt with workmen's compensation suits: County of Monterrey v. Radler, 199 Cal. 221, 248 P. 912 (1926); Los Angeles v. Industrial Accident Comm'n, 8 Cal. App. 2d 580, 47 P.2d 1096 (Dist. Ct. App., 2d Dist. 1935); Eaton v. Bernalillo County, 46 N.M. 318, 128 P.2d 738 (1947); or wrongful death actions: Alabama Great So. R.R. v. Bonner, 200 Ala. 228, 75 So. 986 (1917); Village of Schofield v. De Lisle, 204 Wis. 88, 235 N.W. 398 (1931).

The power to command the aid of private citizens has also been discussed in the context of requests by police for aid from bystanders in 49 OP. MD. ATT'Y GEN. 344 (1964) (concluding that unreasonable failure to render assistance to a police officer effecting an arrest constitutes a misdemeanor), and 35 OP. MD. ATT'Y GEN. (discussing the power to commandeer private citizens and their motor vehicles).

92. The writ of estrepement was the common law writ of waste. It fell into disuse and was abolished in the 1830's. BLACK'S LAW DICTIONARY 652 (4th ed. 1951).

93. Foliamb's Case, 5 Co. Rep. 1156, 77 Eng. Rep. 235 (K.B. 1601).

94. 10 Johns. 85 (N.Y. 1813).

were ensconced in the plaintiff's house, commanded the plaintiff and three other bystanders to guard the house and prevent the escape of the five while the sheriff went for aid. Because the plaintiff instead helped the five escape the sheriff upon his return arrested the plaintiff. The court held that:

> The sheriff may take the power of the county, if necessary, after resistance to execute process. Every man is bound to be aiding and assisting, upon order or summons, in preserving the peace and apprehending offenders, and is punishable, if he refuses.[95]

The sheriff need not be present—nor would it be possible for him to be present at all times—to exercise this power.

In *State ex rel. Sutton v. Allison*,[96] the court upheld judgment against a sheriff for failure to call upon bystanders to assist in executing *fieri facias* in favor of the plaintiff. The sheriff, Allison, levied upon a horse and wagon by only getting a bond from the owner, Hunter, to deliver the goods on the date of the sheriff's sale. The sheriff claimed that he could not have levied upon or seized the full extent of Hunter's property without harm to himself, since he was outnumbered, but the court held that the sheriff had a duty to call out the *posse comitatus* to assist him in serving such a final civil process; failure to exercise his power was a want of diligence. This case gives some support to the notion that the Mayor's failure to call out the *posse comitatus* to help quell a riot was a lack of reasonable care within the meaning of the Riots Act. This was essentially the finding in *Hagerstown v. Dechert*. Yet, the facts of the *Allison* case, as well as the facts of the other cases mentioning the *posse*, are limited to a small confrontation between the person with the power to call out the *posse* and a handful of citizens. Furthermore, in both of these cases the decision was based upon the fact that no other peace officers or police force was available.

Another example of the theoretical nature of the *posse comitatus* is a Maryland case, *Turner v. Holtzman*.[97] There, the driver of a public carriage transporting people to and from a camp meeting parked at the entrance reserved for private carriages, thereby causing a large traffic jam. One of the camp manager's special agents moved the carriage. The driver sued the camp

95. *Id.* at 88.
96. 47 N.C. 339 (1855).
97. 54 Md. 148 (1880).

manager, who had been appointed a deputy sheriff, claiming that the action of the defendant's agent damaged his business. The court cited the sheriff's power to call out the *posse comitatus* and held that the defendant had the power as camp manager and deputy sheriff to use his special agent to abate a public nuisance.

Finally, a recent case, *State v. Goodman*,[98] demonstrates a court's use of the *posse comitatus* as a legal fiction. A sheriff, investigating a burglary of a hardware store without any clues, enjoined the city marshal, that "if he saw any strangers to bring them [in] regardless of who they were."[99] The marshal arrested the defendants outside of the city of Lathrop, searched them, and found evidence of the crime of which they were later convicted. The court discharged the defendants because "being strangers" was not reasonable grounds for arrest. The illegal search incident to the arrest tainted the evidence. To answer the objection that the fourth amendment does not apply to what the state called a private citizen's arrest, the court said ". . . [W]hen the marshall arrested the defendants, as the state admits, he was either doing so in his official capacity or was acting under a posse comitatus."[100] Thus, the concept of the *posse comitatus* was useful to reach what was probably a correct result, but there is little doubt that the sheriff and the marshal did not think of what they were doing in terms of the *posse comitatus*. This case and the others discussed above lead to the conclusion that while the concept may be useful as a legal fiction, the *posse comitatus* is an obsolete institution.

Looking at the question from the perspective of the citizen's duty to obey the sheriff's call to service in the *posse comitatus* reinforces the conclusion of obsolescence. An early English statute, which was incorporated into the Maryland common law, imposed the duty to obey the sheriff's call:

> . . . the King's liege People being sufficient to travel in the country where such Routs, Assemblies, or Riots be, shall be assistant to the Justices, Commissioners, Sheriff, or Under-Sheriff of the same County, where they shall be reasonably warned, to ride with the said Justices, Commissioners, and Sheriffs, or Under-Sheriffs, in aid to resist such Riots, Routs,

98. 449 S.W.2d 656 (Mo. 1970).
99. *Id.* at 661.
100. *Id.*

> and Assemblies, upon Pain of Imprisonment, and to make Fine and Ransom to the King. . . .[101]

The courts in colonial Maryland enforced the general duty to assist the sheriff, sometimes with twenty or forty lashes or with a hefty fine in pounds of tobacco.[102] The Police Acts of 1860 and 1867 had also specified penalities for the failure of citizens of Baltimore City to respond to the call of the sheriff or Board of Police.[103] However, the only present statutory sanctions are those imposed upon citizens failing to answer the call of the tax collector.[104] Essentially, then, citizens answering the sheriff's call would be volunteers, because most citizens probably have never heard of the *posse comitatus* and are not aware of this "power."[105] It would be interesting, indeed, to see what citizens would respond to the sheriff's call to form a *posse comitatus* in order to assist in quelling a riot. In view of the fact that participants in the recent riots have been largely minority group members, and youths,[106] the motivation of those who would volunteer for the *posse comitatus* might lead to harmful consequences.

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101. 2 Hen. VI, stat. 1, c. 8, § 2(5) (1414), ALEXANDER 219-20. *See also* ALEXANDER 202-05.

102. R. SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 9-10 (1970).

103. *See* notes 54 and 57 *supra* and accompanying text.

104. *See* note 87 *supra* and accompanying text.

105. See the section on the community's role in law enforcement, in TASK FORCE ON THE POLICE, THE PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (1967). In discussing the use of the *posse comitatus* "in other periods" of history, the report pointed out that: "Such doctrines may appear highly unrealistic in today's urban setting of frequently hostile crowds, which often refuse aid or even obstruct the police in making arrests. . . ." *Id.* at 224.

The General Assembly recently passed a law allowing the Police Commissioner to create an auxiliary Police Force which "shall be staffed as far as possible with volunteers from the citizens of Baltimore City" and which "shall be used only to render assistance to the police department in service functions including, but not limited to, traffic, communications and clerical duties." The purpose of the auxiliary force would be to free the regular police force for law enforcement duties. Ch. 304, § 1, [1973] Md. Laws 702, H.B. 519, amending § 16-7 of the Code of Public Local Laws of Baltimore City (1969), Md. Public Local Laws Art. 4, tit. Baltimore City, subtit. 16.

While this act condones the use of citizen volunteers, it implicitly rejects the type of use of citizens which the *posse* involves. To emphasize the limited use of the force, the bill was amended to add the word "only" to the description of the service function of the force.

106. This formulation excludes the so-called "police" riots. It would be hard to imagine the use of the *posse comitatus* in this type of riot, except to increase the number of participants. *See generally* D. WALKER, RIGHTS IN CONFLICT (1968) (the report to the National Commission on the Causes and Prevention of Violence on the 1968 Chicago confrontation during the Democratic National Convention, which provides further explanation into this area).

The case of *State v. Parker*[107] illustrates some of the undesirable consequences of citizen participation in the *posse comitatus*. The defendant, accompanying the sheriff and deputy sheriff, shot and killed a chicken thief who was trying to escape. He contested his conviction of second degree murder by arguing, *inter alia*, that he was acting as a member of the *posse comitatus*. The court, in upholding the conviction, noted that the trial judge submitted an instruction embodying the defense of being a member of the *posse* and that the jury found against the defendant on the facts. The court discussed the *posse comitatus* and the protection afforded to its members:

> . . . those orally deputized by a sheriff to aid him in making an arrest for felony are neither officers nor mere private persons, but occupy the legal position of a posse comitatus. But generally, it would seem, a member of a posse comitatus, while cooperating with the sheriff and acting under his orders, is clothed with the protection of the law as is the sheriff.[108]

Although members of the *posse* appear to have the same immunities enjoyed by other peace officers, with no training in the limits upon their actions imposed by statutes and other regulations *posse* members could easily use excessive force in carrying out what they consider their legal duty.

The context of a riot would greatly exacerbate the dangers inherent in the use of the *posse*. An example of the possible excesses can be seen in a nineteenth century charge to the Philadelphia grand jury concerning the means available to the authorities for suppressing riots. After describing the *posse comitatus*, the court described the amount of force that could be used against the rioters:

> If a great number of persons are assembled together, armed with guns or other hurtful weapons, and their object is manifest to do great personal violence to an individual, or to a certain class of individuals, or to destroy public or private property, and they refuse to submit to the law, resist the sheriff or his assistants when they attempt an arrest, and that with violence; when they refuse to disperse, after being commanded by that officer, and are fully bent on violence to the persons or property of others, *and all other probable*

107. 355 Mo. 912, 199 S.W.2d 338 (Sup. Ct. 1947).
108. 199 S.W.2d at 339-40.

> *means* for the suppression of the outrage fail, that officer may order his *posse* to take the lives of the insurgents, if necessary.[109]

Although the theory of controlling riots has perhaps changed, the use of a *posse comitatus* composed of untrained citizens could easily degenerate into urban warfare, with the members of the *posse* using whatever force they thought necessary, and the "insurgents" (including passive bystanders) believing that they were being attacked by another mob.

With the development of the modern police force, and with the change from rural to urban society, conservators of the peace and the *posse comitatus* have lost their meaning and utility. They are not compatible with modern techniques of riot control calling for a highly trained and highly disciplined police force,[110] and therefore the court in *Silver* would have had substantial grounds for saying that these common law institutions could not be a basis for Baltimore City's liability for riot damage.

Possible Consequences

The *Silver* case has now left open the possibility that a jury could find the Mayor and City Council negligent in not calling out the *posse comitatus*. Should this happen, it is likely that the Maryland Court of Appeals will see the case again with the added aid of factual determinations. Such a jury finding would open to examination the inconsistency of burdening Baltimore City with liability for what is in reality the responsibility of its police force, while admitting that the City had no control over the force. Should a finding of negligence stand, the City would then be forced to call the *posse*, with all its possible harmful effects, in any future riot situations.

A jury finding of no liability for failure to call out the *posse*, however, would also leave serious problems. The *Silver* case would still be authority for the viability of both the *posse comitatus* and the conservator of the peace, and the questions

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109. J. BINN, JUSTICE 804 (9th ed. 1886). As this is an example of the legal thinking of the time, the author did not give the factual setting for this charge to the jury.

110. One text on the utilization and training of police for riot control admonishes: "Don't use untrained citizens if it can be avoided. Non-professional persons, regardless of their good intentions and patriotism, usually prove of little or no value." The author continues: "[Riot control training] must be intensive and must reach all who will become involved. . . ." R. MOMBOISSE, RIOTS, REVOLTS AND INSURRECTIONS, 136-37 (1967). The average citizen, or even the potential member of the *posse*, would never receive the necessary training.

would remain as to what circumstances would justify the use of the *posse* and what place in modern society the conservator of the peace would hold.

These questions would be left open even if the jury found the City negligent for failure to take other action, such as communication with and making suggestions to the Police Department. The finding that the City failed to use other possible means to help control the disorder would not necessarily foreclose a finding in future cases that failure to use the *posse* was negligence. While *Silver* seems sound to the extent that it raises a duty to cooperate with police officials, a more articulate guide as to what action City officials are expected to take in riot situations is needed.

Another, and perhaps more serious problem, is that if the City were not found negligent at all, the riot victims of Baltimore City would be left with no remedy, as the City would not be liable for the negligence of its police force.[111] It is apparent, then, that whatever finding the trial court makes will provide ample reason for a reevaluation of the Riots Act and the Police Omnibus Act, as well as of the common law entities upon which the City's liability theoretically rests.

One resolution of the problems would be to return the control of the Baltimore City Police Department to the Mayor and City Council,[112] since the original reasons for the transfer of the control to the state have disappeared.[113] Such a return of control would vindicate the rationale of the Riots Act, to the extent that any city's liability should be based upon negligence of its officers. The Mayor would have control of the primary peace-keeping institution, and the threat of such liability would then cause him to act with reasonable diligence. In the present situation, assuming that the threat of liability for negligence is a substantial motivating factor,[114] this incentive would not extend to the officials who con-

111. Baltimore v. Silver, 263 Md. 439, 449, 283 A.2d 788, 793 (1972), citing Altvater v. Mayor & City Council of Baltimore, 31 Md. 462, 468 (1869) and Sinclair v. Mayor & City Council of Baltimore, 59 Md. 593, 596 (1883).

112. Two bills designed to alter the relationship of the Police Department to the City were introduced during the most recent session of the General Assembly. One bill would have placed the Police Commissioner under the control of the Mayor by giving the Mayor, rather than the Governor, the power to appoint and replace the Commissioner. *See* H.B. 156, Md. Gen. Assembly (1973). A milder bill would only have added a provision that the Police Commissioner would be responsible to both the Governor and the Mayor and that conflicts between the Mayor and the Police Commissioner would be resolved by the Governor. *See* H.B. 1362, Md. Gen. Assembly (1973). Neither bill was passed, however.

113. *See* note 49 *supra*.

114. Although this question goes to the heart of riots acts, it is beyond the scope of this discussion. *See* the sources cited in note 8 *supra*.

trol the police department, as they are not liable for riot damage if negligent.

Another possible solution would be to attempt to deal with the more general problems of municipal liability for riot damage. For example, the legislature could impose absolute liability upon the local political units, as is the case in most states which have riots acts.[115] Baltimore, without control of its police force, would still be an anomaly, but the lack of control over a police force would not affect the City's liability, as the notion of absolute liability does not depend upon ability or upon the exercise of reasonable care.[116] This approach would emphasize the indemnification aspects of riots acts, but it would still place the financial burden upon those governmental units which are least able to afford it.

Another approach would be the imposition of liability upon the political unit which controls the primary police force. Thus, unless control over the police force were shifted, the state would be liable for riot damage in Baltimore City if state officials failed to act with reasonable diligence. This might, however, raise equal protection and due process questions as to whether there was a rational basis for imposing liability upon the entire state for riot damage in Baltimore, while individual counties must shoulder the burden of riot damage incurred within their own boundaries.[117]

Finally, as the best source for indemnification, the state could assume the liability it has imposed upon the subdivisions, for clearly the state has more resources. There would be objections to state liability based upon the negligence of state officials where the damage occurred in subdivisions which had control over their police force, but the state could always provide for temporary incorporation of the local police force into the state peace-keeping organizations, just as the Baltimore City Police Department has been incorporated on a permanent basis. An absolute state liability riot act would represent a change in policy

115. Comment, *The Aftermath of the Riot*, 116 U. PA. L. REV. 649, 687 (1968).

116. *See* W. PROSSER, TORTS §§ 75, 79, and 81 (4th ed. 1971).

117. This issue is beyond the scope of this Note. The likelihood of a successful challenge on these grounds is small, because of the difficulty of overcoming the legislature's discretion. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (equal protection), Railway Express Agency v. New York, 336 U.S. 106 (1949) (due process and equal protection). *See generally Developments in the Law*, 82 HARV. L. REV. 1065 (1969). The focus of this discussion is not on whether such a result is constitutional but on whether it is wise or desirable.

toward compensation of the victim,[118] while serving as no less of an incentive to state officials to act diligently. This, then, would be the preferable alternative, in any reconsideration of the policies behind the Riots Act and the Police Omnibus Act.

CONCLUSION

All of the legal elements involved in *Silver*—the Riots Act, the Police Omnibus Act, the conservator of the peace and the *posse comitatus*—developed during an early time in history and as a result of policies that were substantially different from those appropriate to modern society. The change in the structure of society has nullified the effectiveness of these methods of preserving social stability and now dictates their reexamination. Although the court did not begin this task, *Silver* was an action for declaratory relief, and perhaps the court was justified in its action. More importantly, the necessity of choosing among many conflicting policies, old and new, suggests the wisdom of the court's decision, for many of the legal elements in the case developed from conscious decisions by a legislative body—the British Parliament or the Maryland General Assembly. The issues, the problems and the contradictions involved in *Silver* remain, however, and the legislature should resolve them by abolishing or defining the conservator of the peace and the *posse comitatus*, and by making the Riots Act and the state control of the Baltimore City Police Department compatible with each other.

118. *See* authorities cited in note 8 *supra*.

119. This "welfare theory" would correspond somewhat to state compensation to victims of crimes. *See* Criminal Injuries Compensation Act, MD. ANN. CODE art. 26A (Supp. 1971); Note, *Criminal Victim Compensation*, 30 MD. L. REV. 266, 278 (1970).